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IN THE

Supreme Court of the United States

October Term, 1963

No. 271

BACKUS PLYWOOD CORPORATION,

Petitioner,

against

COMMERCIAL DECAL, INC. and
ALFRED DUHRSSEN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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(b) We have shown that the statute of frauds is not generally applicable to oral joint venture agreements, and particularly to ventures involving land. (Points 1 and 2(a).) Furthermore, the particular facts of the subject joint venture bring this agreement outside the proscription of the Personal Property Law § 31, Subdivision 1, the sole remaining statute of frauds 21

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(c) The District Court assigned no reason for striking out the second cause of action other than the reason that had been applied for granting the entire motion, *i.e.*, its theory that the statute of frauds was applicable. The Court of Appeals dismissed petitioner's appeal as to the second cause of action, and, therefore, rendered no decision as to the merits. Petitioner submits that the Court of Appeals erred in so doing (see Point 3 *infra*), and, in addition, on the merits, the statute of frauds is not applicable to the second cause of action 26

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IN THE

Supreme Court of the United States

October Term, 1963

No. ——

BACKUS PLYWOOD CORPORATION,

Petitioner,

against

COMMERCIAL DECAL, INC. and ALFRED DUHRSSEN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petitioner, Backus Plywood Corporation, hereinafter sometimes called the plaintiff, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the Second Circuit entered in the above cause on May 9, 1963. The Court of Appeals affirmed the judgment of the United States District Court for the Southern District of New York granting the motion for summary judgment by the respondent, Commercial Decal, Inc., dismissing petitioner's first cause of action seeking damages in the sum of $1,000,000.00. The Court of Appeals dismissed petitioner's appeal from the said District Court judgment dismissing petitioner's first and second causes of action against the respondent, Alfred Duhrssen. (The respondents are sometimes hereinafter referred to as the "defendants").

The Opinions of the Courts Below

The opinion of the United States District Court for the Southern District of New York is reported at 208 F. Supp. 687. It is appended at pages 65 through 81.* The District Court granted defendants' motion for summary judgment, dismissing the first and second causes of action of petitioner's complaint upon the defense interposed by the defendants that the statute of frauds barred the claims.

The Court of Appeals for the Second Circuit affirmed the judgment of the District Court as to petitioner's first cause of action against Commercial Decal, Inc., but dismissed petitioner's appeal as to the granting of the motion for summary judgment in favor of the defendant, Alfred Duhrssen, as to the first and second causes of action on the ground stated by the Court that the same was not a final judgment.

The opinion of the Court of Appeals is not yet reported and is appended hereto at pages 5 App. to 12 App.**

Jurisdiction

1. The judgment of the Court of Appeals for the Second Circuit, affirming the judgment of the District Court of the Southern District of New York, dismissing petitioner's claim against the corporate respondent and dismissing the appeal from said judgment dismissing, in part, petitioner's claims against the individual respondent, was dated and entered on May 29, 1963. It is appended hereto at page 13 App.

2. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

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* Page references are to the Appendix in the Court of Appeals.

** References to pages in the Appendix hereto are designated by the page number followed by "App."

The Questions Presented

As to the First Cause of Action

1. Does the statute of frauds of the State of New York apply to an oral joint venture agreement?

2. Even if the statute of frauds would be generally applicable to oral joint venture agreements do the particular facts of the subject joint venture bring this agreement outside of the proscription of the statute of frauds?

As to the Second Cause of Action

3. If the statute of frauds does not apply to the joint venture agreement set forth in the first cause of action, does it not follow that the motion for summary judgment should have been denied as to the second cause of action?

As to the First and Second Causes of Action

4. Is the judgment granting the motion for summary judgment in favor of the respondent, Alfred Duhrssen, a final judgment which is appealable to the Court of Appeals?

5. Has the Court of Appeals followed principles of sound judicial administration in affirming the District Court's granting of the motion for summary judgment?

Statutes Involved

The statutes involved are the following:

28 U. S. C. App. Federal Rules of Civil Procedure (1958 ed.), Rules 54(b) (Supp. IV, p. 1233), 56(b) and (c) (1958 ed., p. 5177);
28 U. S. C. Section 1291 (1958 ed., p. 5015);

New York State Personal Property Law, Section 31, subdivisions 1, 2 and Section 85, McKinney's Consolidated Laws of New York, Anno., Book 40, Part 1; pp. 401-402, Part 2, pp. 129-130;

New York State Real Property Law, Sections 242 and 259, McKinney's Consolidated Laws of New York, Anno., Book 49, Part 2, pp. 11 and 22.

The pertinent portions of these statutes are appended hereto starting at page 1 App.

Statement of the Case

The basis for Federal jurisdiction in the court of first instance was diversity of citizenship and that the matter in controversy exceeded, exclusive of interest and costs, the sum of $10,000.

Since the defendants made their motion based upon their claim that under the facts as claimed by the plaintiff (23-24, 73) summary judgment should be granted, we need concern ourselves only with the plaintiff's claims and not with the defendants' alleged version of the facts. The plaintiff's claims disclose the following:

In brief, the claim asserted by the plaintiff in the first cause of action was that a joint venture had been entered into between the plaintiff and the defendants, that the defendants breached the agreement of joint venture, to the plaintiff's damage in the sum of $1,000,000 (2-5). Since the nature and existence of the joint venture is the very essence of this case, we summarize it for the benefit of the Court.

It was agreed between the plaintiff and the defendants that the business of the corporate defendant would be reorganized as follows: A new corporation, under the name

of Commercial Decal, Inc., would be organized under the laws of the State of Delaware, and the name of the defendant corporation would be changed to some other designation. The stock of the new corporation would be held by the plaintiff. The stockholders of the corporate defendant would continue to hold their stock of the corporate defendant.

The corporate defendant's real estate, of an estimated value of $1,000,000, would continue to be held by the corporate defendant as would its receivables, cash, and intangible assets.

The merchandise, inventory, and the machinery and equipment of the corporate defendant, then having a value of approximately $900,000, would be transferred to the new corporation and the new corporation would pay therefor to the old corporation approximately one-third of its book value, *i.e.*, $300,000, to be furnished by the plaintiff.

All of the valuable tools, dies, decalcomanias, engravings, customers' lists and unfilled orders would be transferred to the new corporation, without compensation.

The new corporation would continue the business of the old corporation without any interruption, commencing October 1, 1958, and would continue to employ the same officers and employees as were employed by the old corporation.

The new corporation would enter into a lease agreement with the old corporation, paying an annual rental of $93,000 plus all real estate taxes, consisting of about $30,000.

The individual defendant would become president and general manager of the new corporation and would receive a substantial salary plus a share of the net profits of the new corporation. One, Alfred H. Sachs, secretary-treasurer of the plaintiff, would become treasurer and financial executive of the new corporation.

The joint venture agreement was orally agreed upon on September 24, 1958. One of the provisions thereof included the execution by the joint venturers of written instruments to reorganize the business of the defendant corporation, implementing the joint venture already entered into, which written instruments were to be executed not later than within a period of 30 days after September 24, 1958. After the execution of said written instruments the joint venture would cease to function as a joint venture, all the provisions thereof having been reduced to writings (38-39, 45-49, 55).

The Facts as to the First Cause of Action

As appears from the affidavit of Alfred H. Sachs read in opposition to the defendants' motion (44), on August 9, 1958, the individual defendant, as President of the corporate defendant, wrote a letter to one Jack Yarmove, a photostatic copy of which appears at page 57. In that letter the defendants agreed to pay said Yarmove a commission of 5% of the gross selling price for the sale of the corporate defendant. It will be noted that the defendant Duhrssen stated in said letter with regard to the corporate defendant "which I control." Mr. Yarmove, acting as broker and as defendants' agent, introduced Alfred H. Sachs to the individual defendant, president of the corporate defendant and its principal stockholder, in August 1958 (45). The first discussions which Sachs had with the defendants were with respect to the defendants' proposals to sell their entire business and assets, or, in lieu thereof, for the stockholders to sell all of the stock held by them in the corporate defendant (45).

After reviewing the information made available to Sachs by Duhrssen, Sachs advised Duhrssen that the proposed sale was not feasible, for the reason that any price for the entire company approximating its book net worth

would be unacceptable to a reasonable purchaser, in view of the company's operating record during the few years immediately prior to 1958; that, on the other hand, the corporate defendant would probably not want to dispose of its business at any price much below its then net value (45).

We quote from the affidavit of Alfred H. Sachs ("1" refers to Alfred H. Sachs) (45-49):

> "I advised Mr. Duhrssen that I had had approximately thirty years experience in the reorganization and refinancing of industrial companies and that if Mr. Duhrssen would be interested we could work out a plan for cooperation between the plaintiff and the defendants as joint venturers whereunder the business would be reorganized and continued in operation by and for the benefit of the three parties so that, ultimately, the defendants and the stockholders of the corporate defendant would be able to realize for their holdings approximately the equivalent of the then book net worth of the company while, at the same time, the investment by the new group would be on a basis considerably less than such book value. I advised him that a joint venture between the plaintiff and the defendants would be undertaken. The joint venture would reorganize the business of the corporate defendant and the following would be accomplished:
>
> A. A new corporation by the name of Commercial Decal, Inc., would be organized under the laws of the State of Delaware and the name of the defendant corporation would be changed to some other designation. The stock in the new Commercial Decal, Inc. would be held by the plaintiff exclusively. The stockholders of the corporate defendant would continue to hold their stock in the old corporation.

B. The real estate of an estimated value of $1,000,000 would continue to be held by the corporate defendant. Similarly the corporate defendant would continue to hold all receivables, all cash and similar intangible assets on the books of said corporation on September 30th, 1958, the end of the corporate defendant's fiscal year.

C. The merchandise, inventory and the machinery and equipment of the defendant corporation then having a value of approximately $900,000 would be transferred to the new corporation and the new corporation would pay therefor to the old corporation the sum of $300,000 to be furnished by the plaintiff (on the basis of one-third of the book value thereof).

D. All the valuable tools, dies, decalcomanias, etchings, engravings, forms, systems, as well as customers' lists and unfilled orders, which were not carried on the books of the defendant corporation for any amount would be transferred to the new corporation, without compensation.

E. The new corporation would continue the business of the old corporation, without any interruption, commencing October 1st, 1958. It would continue to employ the same officers and employees as were employed by the old corporation.

F. The new corporation would enter into a lease agreement with the old corporation and pay a rent to be determined, plus all the real estate taxes. (Subsequently the rent was set by Mr. Duhrssen at $93,000 per annum, plus about $30,000 of real estate taxes and I agreed to these figures and adopted them.)

G. In transferring its merchandise and machinery to the new corporation the defendant corporation would incur a $600,000 book loss. In collecting the

said rents for the building from the new corporation the defendant corporation would have a substantial annual income for at least the first five year period, which income would be offset by the $600,000 loss. Thus the defendant corporation would be able to accumulate within a five year period at least the equivalent of a $600,000 loss without any duty to pay taxes thereon. These proceeds, together with the assets retained by the defendant corporation, would then become available to the corporate defendant's stockholders. On the other hand the rental and real estate taxes to be paid by the new corporation would be a deductible business expense in its operating statement and the amounts for which the merchandise acquired from the old corporation would be sold by the new corporation, over and above the $300,000 cost, would constitute taxable income to the new corporation. Thus these two items would have a balancing effect upon each other in the operation of the new corporation.

Alfred Duhrssen would become president and general manager of the new corporation and would receive a substantial salary plus a division of the net profits of the new corporation. I would become Treasurer and financial executive of the new corporation.

Mr. Duhrssen then advised me that the proposition sounded very plausible and attractive to him but that he would like to discuss this matter with his accountants and then communicate with me again. Subsequently, at another conference between Mr. Duhrssen and myself, he advised me that the corporate defendant's accountants, Ernst & Ernst, thought well of the cooperative plan which I suggested and, in fact, Mr. Duhrssen had drawn up a memorandum

on one sheet of paper summarizing the terms from which he would proceed with this joint venture based upon my suggestions as approved by the corporation's accountants.

Mr. Duhrssen handed me a memorandum dated August 20, 1958, which has been marked defendants' Exhibit 9 for Identification and which is annexed to defendants' moving papers as Exhibit B (S.* p. 28, l. 11 to p. 29, l. 5) (29).

There were numerous subsequent negotiations and discussions and, after the various details were ironed out to the satisfaction of the plaintiff and the defendants, the joint venture agreement was made final on September 24th, 1958.

On September 24th, 1958, at a meeting at the Harvard Club in New York City between Alfred Duhrssen, Roy Backus, president of the plaintiff corporation, and myself as its treasurer, the joint venture plan described above was approved by all three on behalf of the plaintiff and the defendants (B.* p. 12, ll. 3 to 25 and p. 16, ll. 1 to 25) (S. p. 99, ll. 9 to 10) (S. p. 101, ll. 15 to 18) (S. p. 102, ll. 14 to 15).

A study of this joint venture plan shows that it was an integrated whole, a joint venture in the true sense and not an ordinary sale of assets. If it were just a sale, it is obvious that the defendant corporation would not have agreed to transfer $900,000 of its valuable assets for a payment of only $300,000. Likewise, it would not have agreed to turn over to the new corporation all of its valuable customers' lists and orders and all of its decalcomanias, etch-

* "S" refers to pages of the Sachs deposition, "B" to pages of the Backus deposition and "D" to pages of the Duhrssen deposition.

> ings, engravings, systems, etc. without charge. The cooperative plan, taken as a whole, was agreed upon as a joint venture between the plaintiff and the defendants for the mutual benefit of all. Since the fiscal year of the corporate defendant ended September 30th, 1958, the parties agreed that the joint venture agreement which had been agreed upon on September 24th, 1958, should be implemented by writings on or about October 1st, 1958, but certainly not later than within a period of thirty days thereafter."

The Sachs affidavit (55) incorporated by reference the statement pursuant to Rule 9(g) of the Rules of the Southern District of New York made by the plaintiff, which was annexed to said affidavit. Said statement, in paragraph g (39), stated that after the execution of the written instruments implementing the joint venture agreement reached on September 24, 1958, the joint venture would cease to function as a joint venture, all the provisions thereof having been reduced to writings.

The facts above set forth show the making of a joint venture agreement and its terms. The defendants admit that they did not carry out the terms of the joint venture agreement (52). The plaintiff claims damages of $1,000,000 as a result of defendants' breach (53). A trial is, of course, necessary (73) to establish the proof of the existence of the joint venture agreement, and of its terms, conceded (23, 24) by the defendants only for the purposes of the motion, and the proof of plaintiff's damages.

The Facts as to the Second Cause of Action

In this cause of action the plaintiff repeats the paragraphs of the first cause of action except the last allegation dealing with damages. In short, the plaintiff alleges (5-6): that on or about September 24, 1958, the plaintiff and the individual defendant Duhrssen agreed that Duhrssen, as a stockholder and director of the corporate defendant, would approve, would recommend and would urge upon the other stockholders and directors of the corporate defendant that on or prior to September 26, 1958, they approve the joint venture agreement set forth in the first cause of action and it was further agreed that Duhrssen would cause the stockholders to vote such approval.

It is then alleged that Duhrssen, contrary to his agreement, did not himself approve of the agreement as a director and stockholder of the corporate defendant, nor did he urge the other officers and stockholders to approve the plan, nor did he cause the stockholders to approve the plan, and that the plan was not approved by said stockholders and directors. It is then alleged that the plaintiff was damaged in the sum of $1,000,000 by this breach (5 and 6).

Mr. Sachs, in his affidavit, swears that the defendant Duhrssen informed him that he controlled and owned substantially all of the stock of the corporate defendant; that Duhrssen admitted that he had voting control of the stock (51); that he undertook to produce a vote to carry out the terms of the joint venture agreement; that he would approve and recommend it and urge upon the other stockholders and directors that they approve the joint venture agreement. The affidavit further states that the defendant Duhrssen admitted that he did not at the meeting of the stockholders approve the plan and did not urge the other members and stockholders to approve thereof (51-52).

The defendants concede that they did not accept or carry out the joint venture agreement. (See Duhrssen affidavit, p. 21.)

Accordingly, the facts establish the allegations of the complaint (and for the purposes of the motion are conceded by defendants (23, 24)).

The defense of the statute of frauds was interposed. The Court found that the statute of frauds applied and dismissed both the first and second causes of action.

The third cause of action against the individual defendant is for misrepresentation and seeks damages in the sum of $1,000,000. Since it was conceded that this presented a factual issue (68) and since no motion was made for summary judgment as to this cause of action, the same was severed from the first and second causes of action and is now pending undetermined in the District Court.

Plaintiff believes that the same factual issues should be determined as well upon the trial of the first and second causes of action.

REASONS RELIED ON FOR THE GRANTING OF THE WRIT

AS TO THE FIRST CAUSE OF ACTION

POINT 1

The decision herein of the Court of Appeals of the 2nd Circuit is in conflict with the decisions of other United States courts of appeals on the same matter.

Other courts which have considered the question whether the statutes of fraud of New York and other states applied to oral joint venture agreements have treated a joint venture as *sui generis* with reference to any

statute of frauds. A joint venture clearly falls without the ambit of such statutes.

It was, in fact, these very defendants in this case who, in a memorandum of law in support of a motion herein, for separate trials, pursuant to Federal Rules 26, 30(d) and 42(d), stated that (p. 8):

> "Oral joint venture agreements, though involving contracts to which the statute of frauds apply have been held (on the other hand) enforcible."

Among the court of appeals cases illustrative of this principle is *Dayvault* v. *Baruch Oil Corp., et al.*, 211 F. 2d 335 (10th Cir. 1954) wherein an action was based upon an oral agreement creating a joint venture to negotiate for the acquisition and development of oil and gas leases. The District Court granted summary judgment for defendant on the ground that the claim was barred by the statute of frauds. The Court of Appeals reversed and remanded. Discussing the application of New York Personal Property Law, Section 31, and Real Property Law, Sections 242 and 259, the very statutes in question herein (set forth in full herein at pages 2 App. to 4 App.), the 10th Circuit Court of Appeals held (p. 339) that in applying the statute of frauds the courts generally draw a distinction between oral contracts for the sale, transfer or creation of an interest in real property and a joint venture to deal in real estate. The latter is similar to the instant case, where the terms of the joint venture included not only a real estate lease, but also the formation of a new corporation, the reorganization of the corporate defendant, the transfer of certain of its property to the new corporation, the employment of the individual defendant by the new corporation and the continuation of the business of the corporate defendant by the new corporation. The Court held that as to the latter, a joint venture, the real property acquired and dealt in is regarded under New York law as personal prop-

erty among the partners to the speculative adventure and hence not within the statute of frauds.

The Court stated (p. 340):

> "Whatever procedural devices may be employed, courts of equity are not impotent to effect complete justice between parties to a joint adventure;"

Furthermore, it said:

> "We hold merely that as against a motion for summary judgment the complaint and the proof in support thereof establish a joint adventure as to which the statute of frauds of neither the State of New York nor Wyoming is applicable and that appellant is entitled to share in the profits of the joint adventure under the equitable rules underlying the same."

To the same effect is *Libby* v. *L. J. Corp., et al.*, 247 F. 2d 78, 82 (D. C. Cir. 1957) holding that the fact that realty was the subject matter on which the alleged joint venture would operate does not bring the joint venture agreement within the statute of frauds.

It is respectfully submitted that both the District Court and the Court of Appeals herein erred in their respective holdings. The District Court concluded that, assuming a joint venture agreement existed, the statute of frauds nevertheless applied to render the agreement unenforcible (73). The District Court decision is clearly in conflict with the above cited cases as well as the New York law, being the applicable local law in this case (see Point 2(a) *infra*). On the other hand the Court of Appeals completely disregarded the existence of the joint venture.

The Court of Appeals found that the agreement herein was within the statute of frauds and, therefore, unenforceable (9 App.). It stated that the agreement to sell the

assets came within Section 85 of the Personal Property law, the five year lease came within Section 259 of the Real Property law and the agreement for the employment of Duhrssen came within the Personal Property law (Section 31(1)). However, the First Cause of Action is not based upon the breach of an agreement for the sale of personalty of a value of $500.00; it is not based upon the breach of a lease of real property for more than one year and it is not based upon the breach of an employment contract for a term of four years. The only agreement which is alleged in the complaint as a basis for the recovery of damages is one entire joint venture agreement whose terms, *inter alia*, include the execution by the joint venturers of written instruments to reorganize the business of the defendant corporation, implementing the oral joint venture already entered into.

What the Court of Appeals in effect did, was to fragment each of the elements of the joint venture and then apply the statute of frauds to each of the fragments. As a result of the Court's surgery a true picture of the oral joint venture could not be obtained. The joint venture is to be judged as a whole. Each individual component of the joint venture cannot be viewed separately. The joint venture, though oral, was nevertheless enforceable because of the exception to the statute of frauds which is applied to joint venture agreements. The "fragmentation" analysis applied by the Court of Appeals is clearly incorrect because it completely ignores such exception.

POINT 2

The decision of the Court of Appeals, herein, is in conflict with applicable New York State law.

(a) Although many of the cases enunciating the proposition that oral joint venture agreements are enforceable have involved joint ventures for the purpose of dealing in real property, no effective distinction has been or can be drawn between those ventures and joint ventures relating to activities which fall under other sections of the statute of frauds.

Typical of the New York cases holding that oral joint venture agreements of whatever nature are entirely without the operation of the statute of frauds is *Cohen* v. *Bass*, 138 App. Div. 504, 123 N. Y. S. 395 (2nd Dept. 1910). There a parol promise was made by the defendant inducing plaintiff to enter into an arrangement (something short of a partnership) with a third person for the manufacture of a line of goods for defendant. The defendant also agreed that he would guarantee that plaintiff's portion of the profits would amount to a specific sum weekly. The oral agreement was held not within the statute of frauds, despite the fact that one objective of the agreement was a guarantee, which is required to be in writing under New York Personal Property Law, Section 31.

Thus it would appear that the doubts expressed in *Sanger* v. *French*, 157 N. Y. 213, 234 (1898) concerning the applicability of the statute of frauds to oral joint venture agreements has never been resolved to the point of holding that the statute of frauds is applicable.

Furthermore, the fact that real property is the subject matter of a joint venture is of no consequence. See; *Weisner* v. *Benenson, et al.*, 275 App. Div. 324, 89 N. Y. S. 2d 331, 332 (1st Dept. 1949) *aff'd* 300 N. Y. 669 (1950) wherein the Court stated the law of New York as follows:

> "If this was merely an oral contract between plaintiff and defendant Benenson for the purchase of real property as tenants in common, plaintiff is barred from recovery by the statute of frauds, section 259 of the Real Property Law. On the other hand, if it was, as has been held, a contract for a partnership or joint venture in lands, no writing was necessary. *Chester* v. *Dickerson*, 54 N. Y. 1, 13 Am. Rep. 550; *Mattikow* v. *Sudarsky*, 248 N. Y. 404, 162 N. E. 296."

To the same effect is *Libby* v. *L. J. Corp.*, *supra*.

The cases cited by the Court of Appeals in support of its position upon analysis are clearly inapplicable. Both *Levy* v. *Brush*, 45 N. Y. 589 (1871) and *Rizika* v. *Kowalsky*, 207 Misc. 254, 138 N. Y. S. 2d 711 (Sup. Ct. Oneida County 1954), *aff'd*, 139 N. Y. S. 2d 299 (App. Div. 4th Dept. 1955) involved substantially similar factual situations. An examination of the holdings in both cases shows that nothing more was alleged in the complaints than oral agreements to purchase real property, as tenants in common, without any indication that a joint venture or partnership was involved, as in the instant case. In fact, the Court in the *Rizika* case, *supra*, stated that if the allegations in the complaint showed a partnership or joint venture the result would have been different. In this respect the Court stated as follows (p. 714):

> "The allegations of the complaint, giving them every fair intendment, present only an oral agreement among the three persons to purchase realty as owners in common. Such a tenancy does not of itself establish a partnership, whether such co-owners do or do not share any profits made by use of the property. . . . Likewise, there are absent from the complaint the necessary allegations to establish a joint venture. The difference between a joint venture and joint ownership of property is well recognized. Similarity appears in the common interest, but a differ-

ence arises because the latter lacks the feature of adventure. . . .

> "It is recognized that if the course of action was bottomed upon suitable allegations of a partnership or joint venture in reference to the purchase and ownership of the realty formed by parol agreement then such agreement would not be invalidated by reason of Statute of Frauds."

In the instant case, the Court of Appeals has not considered the meaning of a "joint venture" and the difference between such a venture and an ordinary creation or transfer of an interest in property. The Court has literally ignored the allegations of the complaint and the facts set forth in the affidavits and depositions herein showing a joint venture. In fact the Court's citation of the *Levy* and *Rizika* cases, *supra*, evidences its misunderstanding of a joint venture and its fragmentation approach to the problem rather than viewing a joint venture in its entirety as other courts, including the Court in the *Rizika* case, have done, with reference to the statute of frauds.

Contrary to the Court's holding, the *Rizika* case, *supra*, is clearly authority in petitioner's favor, for the reason that that case stands for the proposition that a joint venture, such as the one in the case at bar, is not within the statute of frauds.

The Court of Appeals, herein, incorrectly cites in support of its position the very relevant *Murnane* v. *Maxson Electronics Corp.*, —— Misc. 2d ——, 221 N. Y. S. 2d 1015 (Sup. Ct. Suffolk 1961). This case stands for the proposition that an oral joint venture is enforcible though the venture includes, as in the instant case, a transfer of realty from one venturer to the other. In the *Murnane* case, the complaint alleged that the plaintiff and one Mordecai entered into an oral joint venture agreement for the development of a shopping center on realty owned by Mordecai

and which was to be contributed to the venture. In breach of such agreement, Mordecai, however, transferred the property to the defendant and the present action followed. The defendant, in its answer, set up the defense of the statute of frauds and the plaintiff moved to strike the defense on the ground that the statute did not apply to the joint venture agreement. The court held that it could not grant the motion until the facts were developed at a trial. If a joint venture were established, then the defense would not be applicable. On the other hand, if no joint venture were established, the defense would be valid. The Court held that a joint venture agreement is not subject to the bar of the statute of frauds. The following language from the Court's decision is controlling in the instant case (pp. 1016-1017).

> "'In support of the motion, plaintiff characterizes the agreement as one of joint venture concerning the promotion, development and operation of the land. Therefore, he claims that the statute of frauds has no application. Undoubtedly, it is the law in this State that an agreement of joint venture to deal in realty need not be written (Mattikow v. Sudarsky, 248 N. Y. 404, 162 N. E. 296). However, that decision and others cited by plaintiff proceed on the finding that the joint venture was actually formulated and that the parties thereafter acted pursuant to it. (Dayvault v. Baruch Oil Co., 10 Cir., 211 F. 2d 335, 340; Boxill v. Boxill, 201 Misc. 386, 389, 111 N. Y. S. 2d 33, 36; Mattikow v. Sudarsky, supra, 248 N. Y. p. 407, 162 N. E. p. 297). In Wooten v. Marshall, D. C., 153 F. Supp. 759, 764, upon denying a motion by defendant for summary judgment the Court observed that if the facts were sufficient to establish a joint venture the statute of frauds would not apply. But, if the facts simply showed an agreement for the conveyance of lands, then the agreement would be covered by the statute. (See also Weisner v.

> Benenson, 275 App. Div. 324, 325, 89 N. Y. S. 2d 331, 332). The whole problem revolves around the question of whether or not a joint venture was created. On this motion the Court cannot make a determination either way. The complaint alleges such an agreement, but the answer denies it.
>
> * * *
>
> "In the opinion of the Court, the questions of fact raised by the pleadings preclude granting the motion. As the facts develop at trial the affirmative defense may become worthless, but without that full opportunity by both sides to present their evidence, the Court cannot hold with certainty that the statute does or does not apply."

The foregoing quotation applies with equal force in the case at bar. Since the motion for summary judgment herein was decided on the petitioner's version of the facts (22-24, 73) the only question to be determined below was one of law, *i.e.*, was the joint venture agreement rendered unenforcible by the statute of frauds. New York Law is clear to the effect that the statute of frauds is not applicable. Thus, petitioner should have been entitled to establish the existence of the joint venture at a jury trial.

(b) We have shown that the statute of frauds is not generally applicable to oral joint venture agreements, and particularly to ventures involving land. (Points 1 and 2(a).) Furthermore, the particular facts of the subject joint venture bring this agreement outside the proscription of the Personal Property Law § 31, Subdivision 1, the sole remaining statute of frauds.

Section 31, Subdivision 1, Personal Property Law which prescribes that agreements which, by their terms, are not to be performed within one year from the making or performance of same, must be in writing.

This case involves only the specific agreement of joint venture between the plaintiff and these defendants. The agreement of joint venture could have been performed within one year, since one of its provisions was that it was to be implemented by being reduced to writing within 30 days after September 24, 1958, and upon such implementation, the joint venture, as such, was to terminate.

Upon the performance of the joint venture agreement, all obligations under the joint venture agreement would be completely fulfilled and no further liabilities whatsoever would exist under the joint venture agreement.

At page 77 the District Court stated:

> "Upon execution of these written agreements, argues plaintiff, the joint venture would have been fully performed and would have come to an end."

The Court then took the position that such a view may be supportable. (See footnote 7 of the District Court's opinion at 77.)

New York law is clear that the instant joint venture does not come within Section 31(1) of the Personal Property Law since the agreement could have been performed within one year.

The general rule is concisely stated by Chief Judge Conway in the recent case of *Nat Nal Service Stations, Inc.* v. *Wolf, et al.*, 304 N. Y. 332, 335-336 (1952):

> "Subdivision 1 of Section 31 of the Personal Property Law * * * has been so construed as to apply only to agreements which *by their terms* do not admit of performance within one year from the time of their making and if performance be possible within the year, however unlikely or improbable that may be, the agreement does not come within the proscription of the statute. See, e.g., *Trustees of First Bap-*

tist Church v. *Brooklyn Fire Ins. Co.*, 19 N. Y. 305; *Warren Chemical & Mfg. Co.* v. *Holbrook*, 118 N. Y. 586; *Blake* v. *Voight*, 134 N. Y. 69, 31 N. E. 256; *Ward* v. *Hasbrough*, 169 N. Y. 407, 62 N. E. 434." (Emphasis supplied by the Court.)

Other recent cases to the same effect include *Storer* v. *Ripley*, 1 Misc. 2d 235, 125 N. Y. S. 2d 831 (Sup. Ct. West. 1953), *aff'd* 282 App. Div. 950, 125 N. Y. S. 2d 339, motion for leave to appeal denied, 282 App. Div. 1061, 126 N. Y. S. 2d 912, 306 N. Y. 984; *Nathanson* v. *Brown & Williamson Tobacco Corp.*, 189 Misc. 1024, 1029, 68 N. Y. S. 2d 914 (Sup. Ct. N. Y. 1947); *Duncan* v. *Clarke*, 308 N. Y. 282 (1955); *Robinson* v. *Estate of Hayes*, 239 N. Y. 512 (1924).

In *Corbin on Contracts*, the rule is stated in Volume 2, Section 444, page 535, as follows:

> "It makes no difference how long performance may be delayed or over how long a period it may in fact be continued. It makes no difference how long the parties expect performance to take or how reasonable and accurate those expectations are, *if the agreed performance can possibly be completed within a year.*"

See also *Blakeley* v. *Agency of Canadian Car & Foundry Co. Ltd.*, — Misc. —, 73 N. Y. S. 2d 573 (Sup. Ct. N. Y. 1947), *aff'd* 74 N. Y. S. 2d 829 (1947), where it was stated:

> "Nor is the defense of the statute of frauds available. The statute (Personal Property Law, Sec. 31) applies only to agreements which, by their terms, do not admit of performance within the period of one year from the time of their making. If performance, such as the parties contemplated, was possible within the year, however unlikely or even improbable that might be in the light of the surrounding circumstances, the agreement is not within the statute.

Cohen v. *Bartgis Bros. Co.*, 264 App. Div. 260, 35 N. Y. S. 2d 206, aff'd 289 N. Y. 846; *High* v. *Pritzker*, 58 N. Y. S. 2d 706, 707, 708, aff'd 269 App. Div. 1015, 59 N. Y. S. 2d 57; *Steiner* v. *Fenster*, 51 N. Y. S. 2d 814; *Harvey* v. *J. P. Morgan & Co.*, 166 Misc. 455, 462, 2 N. Y. S. 2d 520, 529. Here the award might have been made and the contract performed within a year, even though the contingency seemed unlikely and even improbable. There did exist possibility of performance in law and in fact. This is sufficient. The circumstance that the award was not actually made within the year is not controlling. It does not render the agreement void and unenforceable."

It must be remembered that the defendants claim that they are willing to have the motion for summary judgment determined on the plaintiff's version of the facts (23, 24). The plaintiff claims that writings implementing the procedures contemplated by the joint venture agreement reached on September 24, 1958, were to be executed not later than 30 days thereafter (39, 49, 55). This oral agreement to arrange for written instruments implementing the terms of the joint venture agreement is enforcible even if the oral joint venture agreement were unenforcible because not in writing. See the leading case of *Greenspun* v. *Roos*, 48 F. Supp. 281 (E. D. N. Y. 1942) which bears a striking analogy to this case. In *Greenspun*, an action was brought for breach of an oral agreement to assign to the defendant plaintiff's contract to purchase land, the defendant agreeing to take title to such land in the name of a corporation to be organized by the defendant as majority stockholder; to cause the corporation to issue 25% of its stock to plaintiff; and to employ the plaintiff as exclusive advertising and sales agent for a period of five years at a stipulated salary. The defendant moved to dismiss for failure to state a claim on the basis of the statute of frauds,

Real Property Law, Section 259, and Personal Property Law, Section 31(1). The Federal Court, interpreting New York law, held, in denying the motion that (p. 283):

> "* * * the oral agreement clearly is one which could have been performed within a year from the making, so far as the defendant was concerned; and in respect to any matter to be performed by the plaintiff under his contract, he too could have performed, and as alleged did perform, within that period of time. Indeed, the complaint alleges that the plaintiff duly performed all of the terms and conditions of his agreement with the defendant on his part to be performed. Of course, he could not have performed within one year if the consideration for the agreement was that he bind himself to give services to a corporation not yet organized for a period of five years. The oral agreement bound the defendant to procure such a contract of employment for him. It is that contract which, if made, would under the statute be required to be in writing to bind the plaintiff and such corporation."

Thus, even if the statute of frauds were to be a bar to plaintiff's recovery because the joint venture agreement was not in writing, the agreement to reduce to writing the implementing instruments is enforcible under the statute of frauds.

The Court did not attempt to distinguish the *Greenspun* case and cavalierly disposed of it in a footnote stating that it was contrary to New York law.

In so holding, however, it is submitted that the Court of Appeals did not follow New York Law. As in the *Greenspun* case, in the instant action, the agreement of the parties was not the performance of services to be rendered for a period of more than one year but only to reduce the oral agreement to writing within 30 days.

Belmar Contracting Company, Inc. v. *State of New York*, 233 N. Y. 189, 135 N. E. 240 (1922), cited by the Court in support of its position, is clearly inapplicable for it involved a special situation, since in that case a state law required that contracts with the state must be in writing in order to establish liability on the part of the state.

Thus, as we have shown the statute of frauds is not generally applicable to joint venture agreements. Certainly, in no event, is the joint venture agreement barred by said Section 31(1).

AS TO THE SECOND CAUSE OF ACTION

(c) The District Court assigned no reason for striking out the second cause of action other than the reason that had been applied for granting the entire motion, *i.e.*, its theory that the statute of frauds was applicable. The Court of Appeals dismissed petitioner's appeal as to the second cause of action, and, therefore, rendered no decision as to the merits. Petitioner submits that the Court of Appeals erred in so doing (see Point 3 *infra*), and, in addition, on the merits, the statute of frauds is not applicable to the second cause of action.

The defendants, in the courts below, argued that since the oral agreement of joint venture, as they claim, was barred by the statute of frauds, the individual defendant's oral agreement to procure approval of the joint venture agreement by the corporate defendant was by the same token unenforcible. However, as we have shown in points 1 and 2 dealing with the first cause of action above, the statute of frauds is not applicable to the joint venture agreement and, accordingly, the defendants' entire argument as to the second cause of action falls. The defendants do not claim, as they can not, that the oral agreement of the individual defendant to procure the consent of the cor-

porate defendant would be unenforcible if the joint venture agreement itself were enforcible.

Since, as we have shown in the points under the first cause of action, the joint venture agreement is enforcible, the oral agreement by the individual defendant to procure the consent of the corporate defendant thereto is also enforcible (39, 49, 51, 55). Even if the joint venture agreement were unenforcible, the individual defendant's oral agreement to procure the consent of the corporate defendant, since it could have been procured or performed within a year, is enforcible. Particularly apposite is the case of *Greenspun* v. *Roos*, 48 F. Supp. 281, cited in Point 2(b), which held that the oral agreement to procure a written agreement, which latter agreement is required to be in writing, is enforcible under the statute of frauds.

AS TO BOTH CAUSES OF ACTION

POINT 3

The Court of Appeals has decided an important question of federal procedure in conflict with applicable decisions of this Court.

The holding by the Court of Appeals dismissing petitioner's appeal from so much of the District Court judgment granting summary judgment in favor of respondent Duhrssen, as not being a final judgment under 28 U. S. C. Section 1291, is directly contrary to two recent decisions of this Court * *Sears, Roebuck & Co.* v. *Mackey, et al.*, 351 U. S. 427 (1956) and *Cold Metal Process Company, et al.* v. *United Engineering & Foundry Company*, 351 U. S. 445 (1956).

The Court of Appeals concluded that since the first and second causes of action on which the motion for summary

* Neither party raised the point. The dismissal was on the Court's own motion without requesting counsel to submit briefs.

judgment was granted and the third cause of action, which is still pending before the District Court, arose out of the same "aggregate of operative facts" that the District Court abused its discretion when it entered a final order under Rule 54(b), Federal Rules of Civil Procedure. An examination of the holdings by this Court in the *Sears, Roebuck* and *Cold Metal* cases, *supra*, demonstrates that the Court of Appeals did not consider these cases in making its decision. Under both of those cases, it is clear that the judgment entered herein by the District Court is a final judgment which is appealable as to both respondents.

In the *Sears Roebuck* case, *supra*, this Court held that under Rule 56(b) two conditions were necessary, in a multiple claims action, which is the situation in the instant case for a judgment to be appealable to the Court of Appeals. First, that the District Court make an "express determination that there is no just reason for delay" and "an express direction for the entry of judgment" (p. 435). Second, "that each of the claims dismissed is a 'claim for relief' within the meaning of Rule 54(b), or that their dismissal constitutes a 'final decision' on individual claims" (p. 436).

As to the first requirement, the District Court herein has made both the express determination and the direction for the entry of judgment as is shown by that Court's judgment which is set forth at 82 App.

With respect to the second requirement, it is submitted that the dismissal of the first and second causes of action are final decisions dismissing claims for relief or dismissals, which constitute final decisions on individual claims. The first cause of action alleged breach of the oral joint venture contract on the part of both respondents. The second cause of action alleged the breach by the individual respondent of his agreement, as a controlling shareholder of the corporate respondent, to obtain the approval of the other

shareholders to the joint venture agreement. The third cause of action seeks damages against the individual respondent for misrepresentation. As a result of the dismissal of the two contract causes of action, petitioner can only proceed with the third or tort action. Although the factual situation under all three causes of action is in some respects similar, they are, of course, dissimilar in that as to the third cause of action, petitioner must prove all of the elements of fraud in order to establish liability. Thus, petitioner would have to show that there was a false representation, scienter, deception, reliance, and injury. Under the first and second causes of action, however, since they are in contract it would only be necessary for petitioner to prove the existence of the contract the breach thereof by the respondents, and damages.

In any event, plaintiff is entitled to a trial of all the facts, including the proof relative to the existence of the joint venture.

Thus, it is clear that each of the causes of action stated a separate claim for relief and that each of them "*can* be decided independently of each other" (351 U. S. at 436). The fact that all three causes of action arise out of a somewhat *similar factual* situation does not preclude the application of Rule 54(b), for, being separate claims, there is no abuse of the final decision rule. In this respect, directly in point, is the *Cold Metal* case *supra;* in which this Court held that the judgment entered in favor of the plaintiff was a final decision, which was appealable, even though there was still pending before the District Court the defendant's counterclaim which arose out of the same factual situation as the plaintiff's claim. The Court held that the factual similarity was of no consequence since under Rule 54(b) a counterclaim is treated like any other type of claim in a multiple claims case.

In its decision herein, the Court of Appeals does not cite either the *Sears, Roebuck* or the *Cold Metal* cases,

supra, but relies upon other Second Circuit cases, most of which predate the two decisions of this Court. The Court of Appeals should have followed the clear mandate of this Court and held that the entire judgment of the District Court was appealable.

POINT 4

The decision of the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

This Court has had occasion to express itself on the question as to the proper considerations to be applied in ruling upon a motion for summary judgment under Rule 56, Federal Rules of Civil Procedure.

In *Kennedy* v. *Silas Mason Company*, 334 U. S. 249, 256-257 (1948), this Court stated the rule as to the granting of a motion for summary judgment as follows:

> "But summary procedures, however salutary where issues are clear-cut and simple, present a treacherous record for deciding issues of far-flung import, on which this Court should draw inferences with caution from complicated courses of legislation, contracting and practice.
>
> "We consider it the part of good judicial administration to withhold decision of the ultimate questions involved in this case until this or another record shall present a more solid basis of findings based on litigation or on a comprehensive statement of agreed facts. While we might be able, on the present record, to reach a conclusion that would decide the case, it might well be found later to be lacking in the thoroughness that should precede judgment of this importance and which it is the purpose of judicial process to provide."

This Court further stated in *Poller* v. *Columbia Broadcasting System, Inc., et al.*, 368 U. S. 464, 473 (1962), as follows:

> "We believe that summary procedures should be used sparingly in complex anti-trust litigation where motive and intent play leading rolls. * * * It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'"

Though the remarks of the Court in the *Poller* case are directed to a treble damage anti-trust action, the same would nevertheless be applicable to summary judgment motions in general. See the dissenting opinion of Justice Harlan at page 467.

It is submittted that the Court of Appeals herein has disregarded the foregoing principles in affirming the respondent's motion for summary judgment. Indicative of this is the following statement by Judge Leahy in *Stern & Co.* v. *State Loan & Finance Corporation*, 205 F. Supp. 702, 707-708 (D. Del. 1962):

> "In the Second Circuit, debate, always instructive and often profound has been long standing between those proponents of the views of Judge Clark, who favored a broader grant of summary judgment, and those of the late Judges Learned Hand and Frank, who favored a more limited grant. In this circuit, the decision has long since been reached that courts will look particularly closely to insure that parties are not too quickly deprived of a 'full dress' trial."

A further example of the manner in which the foregoing principles enunciated by this Court are to be applied

is found in the remarks of Circuit Judge Pope in his concurring opinion in *Marshall* v. *Sawyer*, 301 F. 2d 639, 647-648 (9th Cir. 1962).

> "Notwithstanding, I am of the view that the complaint here fails to state a claim, I agree that the case should be remanded for trial and at such trial the facts developed and findings made. In my opinion, the issues here are of such vital importance that the principles of sound judicial administration expounded in *Kennedy* v. *Silas Mason Co.*, 334 U. S. 249, 256, 68 S. Ct. 1031, 92 L. Ed. 1347, and *Poller* v. *Columbia Broadcasting Co.*, U. S. 82 S. Ct. 486 (February 19, 1962), require that such issues should not be resolved upon a record so limited as this one is. If I were to base a final judgment upon the complaint alone, read in the light of what I know judicially about the State of Nevada. * * * I would be obliged to say that plaintiff is entitled to no relief. But I think the validity of my judgment on that matter can best be tested after all the evidence is in."

The affirmance by the Court of Appeals herein presents a situation in which the "principles of sound judicial administration" have not been followed. In the instant case it cannot be denied that the issues presented are not "clear-cut and simple" but are of "far-flung import." This case involves a complicated and intricate factual situation in which the plaintiff claims damages of $1,000,000. Also involved is an important question of law regarding joint ventures which is of profound importance to our business and financial community. Until the decision of the Court of Appeals, herein, the rule has always been that joint ventures were not subject to the statute of frauds. Now, however, that principle has been seriously undermined as a result of the instant decision. The Court of

Appeals has ignored developed and sound legal theories and law. Henceforth joint ventures no longer enjoy their special status of invulnerability to the statute of frauds.

Furthermore, it cannot be denied that the factual issues herein are complicated and require a trial to determine whether a joint venture existed. As was stated by Judge Edelstein in the District Court below (73):

> "Although I have dealt in detail with the arguments concerning the existence of a joint venture, I do not believe that this question can be resolved on this motion for summary judgment. * * * Notwithstanding defendants' willingness to rely upon the affidavits and depositions of plaintiff to show that no agreement existed, resolution of the questions on this aspect of the case would require the testimony of live witnesses whose credibility can be judged by the trier of fact."

The Court, however, then proceeded to determine the issues on the basis of, to say the least, a questionable proposition of law; namely, that the statute of frauds does also apply to joint venture agreements.

Furthermore, it is submitted that the Court of Appeals characterized as dubious the question of the existence of a joint venture by stating "Passing the dubious question of whether the alleged agreement constituted a joint venture." In an action involving $1,000,000 (of which damages of at least $600,000.00 are obvious from a mere perusal of the pleadings) so serious and complex a question should have been submitted to a jury for determination.

Since it is admitted that serious and complicated factual questions exist, *i.e.*, among others, as to whether a joint venture agreement was made, as to its terms, as to the amount of damages, which can only be resolved upon a trial and since conflicting authorities are cited by both

sides and the Courts below relating to the question of law, concerning the application of the statute of frauds to oral joint ventures, the Court of Appeals should have reversed the District Court's grant of summary judgment and remanded the case for a jury trial of the issues. Further, the Court of Appeals should not have dismissed petitioner's appeal as to the individual respondent since the entire judgment appealed from, under the decisions of this Court, is a final decision.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

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